

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-1343

ORIGINAL

B
P/S

In The
United States Court of Appeals
For The Second Circuit

THE UNITED STATES OF AMERICA,

Appellee,

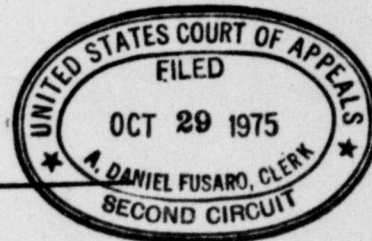
vs.

PAULA DALLAL,

Appellant.

BRIEF FOR APPELLANT

KENNETH KAPLAN
Attorney for Appellant
919 Third Avenue
New York, New York 10022
(212) 688-0147



(8837)

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J.
(201) 257-6850

New York, N.Y.
(212) 563-2121

Philadelphia, Pa.
(215) 563-5587

Washington, D.C.
(201) 783-7288

2

TABLE OF CONTENTS

| | Page |
|---|------|
| Issue Presented for Review | 1 |
| The Indictment | 1 |
| Statement of the Case | 1 |
| Argument: | |
| Point I. The Court's charge on the sub- ject of entrapment was defective and deprived the appellant of a fair deter- mination of a crucial issue in this case. | 7 |
| Conclusion | 12 |

TABLE OF CITATIONS

| <u>Cases Cited:</u> | Page |
|--|--------|
| Government of the Virgin Islands v. Cruz, 478 F.2d 712 (3d Cir. 1973) | 11 |
| Kodis v. United States, 373 F2 370 (1st Cir. 1967) | 10 |
| Lucas v. United States, 355 F2 245 (10th Cir. 1966) | 11 |
| Notaro v. United States, 363 F2 169 (9th Cir. 1966) | 10 |
| Robinson v. United States, 366 F2 575 (10th Cir. 1966) | 11 |
| United States v. Berger, 433 F2 680, 684 (2d Cir. 1970) cert. denied, 401 U.S. 962 . . | 9, 10 |
| United States v. Braver, 450 F2 799 (2d Cir. 1971) cert. denied, 405 U.S. 1064 (1972) . . | 9 |
| United States v. Cohen, 431 F2 830, 832 (2d Cir. 1970) | 10 |
| United States v. DeVore, 423 F2 1069 (4th Cir. 1970) | 10, 11 |
| United States v. Riley, 363 F2 955, 958-959 (2d Cir. 1966) | 10 |

iii
Contents

| | Page |
|---|------|
| United States v. Silver, 457 F.2d 1217 (3d Cir. 1972) | 11 |
| United States v. Watson, 480 F2 504 (3d Cir. 1973) | 11 |

Statutes Cited:

| | |
|------------------------------------|---|
| 18 U.S.C. 2 | 2 |
| 18 U.S.C. 5010(b) | 2 |
| 18 U.S.C. 5017(e) | 2 |
| 21 U.S.C. 841(a)(1), 846 | 2 |

UNITED STATES COURT OF APPEALS
For The Second Circuit

- - - - - x

THE UNITED STATES OF AMERICA,

Appellee,

-against-

PAULA DALLAL,

Appellant.

- - - - - x

BRIEF FOR APPELLANT

ISSUE PRESENTED FOR REVIEW

Was the Court's charge on the issue of entrapment defective and did it thus deprive the appellant of a fair determination of a crucial issue in the case?

THE INDICTMENT

The indictment filed against the appellant contained four counts and charged her in Counts 1 and 2 with unlawfully distributing cocaine and with co-defendants O'Brien and Fayad and in Count 4 with conspiracy to commit those offenses.

STATEMENT OF THE CASE

Paula Dallal was charged in three counts of a four count indictment with unlawfully distributing twenty-one grams of

cocaine on March 7, 1975 (Count 1) and twenty-eight grams of cocaine on April 30, 1975 (Count 2) and conspiracy to commit these offenses (Count 4).^{*} She was tried before Platt, J. and a jury. The jury returned guilty verdicts on each count in which she was named.

On September 19, 1975 Miss Dallal was sentenced pursuant to 18 U.S.C. 5010(b) until discharged by Federal Youth Correction Division as provided in 18 U.S.C. 5017(e) (116a).

On the same day, a motion for a new trial on the ground that the instructions given to the jury on the issue of entrapment were erroneous was denied. A timely notice of appeal was filed. Miss Dallal is enlarged on bail pending appeal (103a).

The government's evidence in this case consists largely of the testimony of an undercover narcotics agent, Cavuto, and the co-defendant, O'Brien.

I shall now summarize briefly the testimony insofar as it relates to Miss Dallal:

Cavuto:

To introduce Miss Dallal to undercover agent Cavuto, a government informant was given, "****around \$800.00" (8a) on "**** five different times" (9a). He got his money, "****after he performed the service" (10a), and if he did not supply the

^{*} The statutes involved are 18 USC 2; 21 USC 841(a)(1), 846.

information or make the introduction he would get nothing "****in this instance" (11a). After March 7, 1975 the informant received \$100.00 (12a).

On March 7, 1975 Cavuto went to Miss Dallal's apartment with the informant and was introduced to her as a buyer of narcotics (13a, 14a). The three left for Queens in Cavuto's automobile where they met O'Brien to whom Cavuto was introduced by Miss Dallal (15a, 17a). Cavuto purchased cocaine from O'Brien and paid him \$900.00 (18a).

Cavuto called and spoke to Miss Dallal in the subsequent seven week period approximately twelve or thirteen times, on each occasion asking her to get in touch with O'Brien (19a). He met with her a second time on April 30, 1975, drove her to Queens and again made a purchase of cocaine from O'Brien (20a).

O'Brien:

O'Brien pleaded guilty to Count 1 of the indictment and testified on behalf of the government that on March 7, 1965 and April 30, 1975 he sold cocaine to Cavuto (23a, 24a). He further testified that on both occasions Miss Dallal did not physically possess the cocaine nor did she receive money for the transaction of March 7, 1975 (25a, 26a).

The defense consisted of testimony by six reputation witnesses and Miss Dallal.

Dallal:

Miss Dallal testified that she was twenty-three years old, graduated from high school, worked as a secretary-receptionist and earns \$140.00 weekly. She has never before been in any trouble (27a, 33a).

Prior to the commission of the offenses the informant Jeff called her approximately twenty times during the months of February and March, 1975 and visited her apartment approximately eight times, always begging and cajoling her to get cocaine for his friend Al (Cavuto). He did this "***just about every time he called" (38a, 39a). He relentlessly continued to entreat and implore her to get cocaine for his friend notwithstanding that she would tell him that she was unable to do it or she did not know if she could (35a, 36a). The informant called her "*** four or five times a day, constantly ***" (37a, 40a, 55a). On all of these calls and meetings he beseeched her to "***Please, please, can you get me some cocaine. My friend lost his connection. He really wants ****. Please, please ***" (37a). This unremitting barrage by the informant to ensnare her to commit the offenses continued. "*** Jeff had called me every day and I really didn't want him bothering me any more. They were the only two people (meaning the informant and Cavuto) I told my father had gotten sick and I was

going to Japan with my mother to see him and wouldn't be around. I thought he wouldn't call me any more, and he wouldn't keep asking me about cocaine" (54a -2, 55a), and that "*** the only way I could think they would leave me alone was if I told them I was going to Japan ***" (56a). She continued, "*** Can't you just leave me alone ***", "*** I started hanging up on him ***" (58a).

Miss Dallal met Cavuto for the first time on March 7, 1975. The informant introduced Cavuto to her as his friend, "*** the one who wants to buy the cocaine" (38a). In order to avoid the incessant phone calls from the two of them (the informant and the agent) she told her roommate to tell them she wasn't at home. Cavuto and the informant continued without let up to break down her reluctance to contact O'Brien. "***get in touch with Robby***". "***Please, please***" (41a). He spoke to her fourteen or fifteen times in addition to the phone calls she did not accept when she learned that Cavuto was the caller (42a, 43a). Further describing Cavuto's incessant phone calls she testified:

"A. They were all, "Paula, did you call Robbie," I answered, "No, his line was busy." I never said yes because I never even tried him. He just kept saying, "Can you please" or "Just give me Robbie's number." I said I don't give anybody's number out.

He said, "Please, I would like to buy it. Money is no problem," he said, "Jeff doesn't have to come if you don't like him, so that's no problem." He said, "Please keep trying Robbie. Do you want me to call you back? Tell me when" (43a).

The phone calls continued (44a, 45a) compelling Miss Dallal to lie to Cavuto and the informant regarding her father's health so "***maybe they would have compassion and leave me alone***" (46a, 47a). She had her telephone number changed in part to stop the calls.

When arrested she cried and asked Cavuto "*****why he forced me to do it. Why did he make me do it" (54a-1).

On cross-examination Miss Dallal testified she had dealt with O'Brien once before (48a) but received no money (49a) and one occasion offered to sell Cavuto a "Thai stick" (marijuana) and an amphetamine (50a, 52a). She used barbituates and took other pills (53a, 54a).

ARGUMENTPOINT I

THE COURT'S CHARGE ON THE SUBJECT OF ENTRAPMENT WAS DEFECTIVE AND DEPRIVED THE APPELLANT OF A FAIR DETERMINATION OF A CRUCIAL ISSUE IN THIS CASE.

Since the proof showed that the government initiated the events of February 7, 1975 and April 30, 1975, Miss Dallal raised the defense of entrapment. On this issue the Court incorrectly charged the jury as follows:

"The defendant asserts that she was a victim of entrapment as to the offense charged in the indictment.

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officer or their agents to commit a crime, she is a victim of entrapment and the law as a matter of policy forbids her conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is no entrapment. For example, when the government suspects that a person is engaged in the illicit sale of narcotics, it is not entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from the suspected person.

If, then, the jury should find beyond a reasonable doubt from the evidence in the case

that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded and that government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.

On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty.

The question of entrapment involves two issues. The first issue is whether the defendant was led or induced to commit the crime by anyone acting for the government. That is, did the government initiate the criminal transaction? On this issue the defendant has the burden of proof. He does not have to prove it beyond a reasonable doubt but he must prove it by a fair preponderance more likely than not that the government initiated the criminal transaction involved in this case. If you do not find such inducement then there was no entrapment, but if you do find such inducement then you must consider the second issue.

The second issue is whether the defendant was ready and willing to commit the crime without persuasion. This is sometimes expressed as an issue of whether he had a propensity to commit the crime. On this issue the government has the burden of proof and it must prove it beyond a reasonable doubt" (83a, 85a). (Emphasis added).

The defense counsel objected to that portion of the charge underlined on the ground that the different burdens were incorrect (99a).*

This Court in the case United States v. Braver, 450 F2 799 (2d Cir. 1971), cert. denied, 405 U.S. 1064 (1972), approved the language in United States v. Berger, 433 F2 680, 684 (2d Cir. 1970), cert. denied, 401 U.S. 962, that a defendant had to:

"[A]dduce some evidence that a government agent by initiating the illegal conduct himself induced the defendant to commit the offense. If you find that the defendant * * * has adduced such evidence then the government must prove beyond a reasonable doubt that the inducement was not the cause of the crime, that is, that the defendant * * * was ready and willing to commit the offense." (Emphasis added).

The Court in Braver continued on ppgs. 804 and 805:

"In light of all of this, we suggest that it would be preferable for the district courts of this circuit to use an entrapment charge that does not give to the jury two ultimate factual issues to decide on two different burdens of persuasion imposed upon two different parties. While we do not specifically define this preferable charge, we suggest that there be no reference to 'burden' or 'burden of proof' or 'preponderance of evidence' in describing a defendant's obligation. In explaining the burden of proof on entrapment, it will be enough to tell the jury that if it finds some evidence of govern-

* Defense submitted instructions on entrapment free from error (59a).

ment initiation of the illegal conduct, the Government has to prove beyond a reasonable doubt that the defendant was ready and willing to commit the crime. The language quoted from United States v. Berger, supra, would obviously be appropriate." (Emphasis added).

Notwithstanding this clear instruction to the District Courts in this Circuit, the trial judge instructed the jury that on the issue of the government's initiation of the criminal transaction, "***the defendant has the burden of proof***" and "***must prove it by a fair preponderance of the evidence" (84a).

Other circuits have indicated their preference for the unitary charge, that is, they have approved entrapment instructions that do not separate the issues of inducement and propensity and do not impose a burden on the defendant to prove any element of the entrapment defense by either a "burden of proof" or "preponderance".

"The issues having appeared, it becomes the prosecution's burden to establish beyond a reasonable doubt that the accused was not entrapped into the commission of the offense," Notaro v. United States, 363 F2 169 (9th Cir. 1966). See Kadis v. United States, 373 F2 370 (1st Cir. 1967); United States v. Cohen, 431 F2 830, 832 (2d Cir. 1970); United States v. Riley, 363 F2 955, 958-959 (2d Cir. 1966); United States v. DeVore,

423 F2 1069 (4th Cir. 1970); Robinson v. United States, 366 F2 575 (10th Cir. 1966); Lucas v. United States, 355 F2 245 (10th Cir. 1966).

In United States v. Watson, 480 F2 504 (3rd Cir. 1973) the Court held at page 510 and 511:

"This court has never had to directly face the question of whether the giving of the bifurcated charge constitutes error. However, we have indicated our preference for a unitary charge. In United States v. Silver, 457 F.2d 1217 (3d Cir. 1972), we called it a 'settled principle' that 'when the defense of entrapment is properly raised the burden of proof is on the Government to prove beyond a reasonable doubt that the defendant was not entrapped'" 457 F.2d at 1220.

Furthermore, in Government of the Virgin Islands v. Cruz, 478 F.2d 712 (3d Cir. 1973), decided after the district court decision in this case, we approved of an instruction which places the burden on the Government to disprove the whole defense beyond a reasonable doubt.

Under the unitary approach we require, inducement therefore enters as an element of predisposition which the Government must disprove rather than as an independent element which the defendant must prove.

Pragmatic considerations also inhibit us from approving an entrapment charge involving two elements, with different burdens of proof on different parties for each element. We see no valid justifications for imposing such a confused standard on a jury in a criminal case for a judicially created defense which, as pointed out above, involves essentially a single element. Indeed, we

are supported in this view by the Government brief in this case which concedes that 'it must fairly be said that the initial treatment in the charge of the entrapment issue could generate confusion on the part of the jury.'" (Emphasis added)

Miss Dallal when she raised the entrapment defense, asserted in effect that the conduct ascribed to her was not free but rather the overreaching of the government. Once properly raised, the burden is on the government to prove non-coersion and a predisposition to commit the offenses, the government in a criminal case is compelled to prove the crime - the defendant is not called upon to prove innocence.

CONCLUSION

Since the trial jury was incorrectly instructed on the critical issue of entrapment, the judgment of conviction must be reversed.

Respectfully submitted,

s/ Kenneth Kaplan
Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

PAULA DALLAL,

Appellant,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

NEW YORK

ss.:

I, **James A. Steele** being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N.Y.

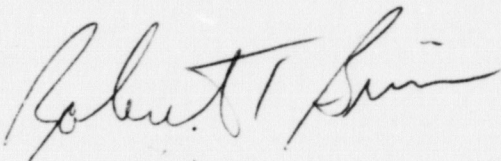
That on the 27th day of October 1975 at 225 Cadman Plaza, Brooklyn, N.Y.

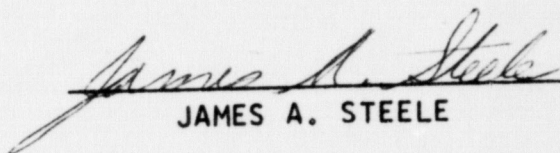
deponent served the annexed Brief upon

David G. Trager

the **Attorney** in this action by delivering 2 true copy^s thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein.

Sworn to before me, this 27th
day of October 1975




JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977